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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

SNC MANUFACTURING CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Justices of the Supreme Court of the United States:

SNC Manufacturing Co., Inc., petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered on May 13, 1965, enforcing an order of the National Labor Relations Board issued on June 26, 1964 requiring, among other things, that petitioner "upon request bargain collectively with International Union of

Electrical, Radio & Machine Workers, IUE, AFL-CIO, as the exclusive representative of employees at petitioner's plants in Oshkosh, Wisconsin'' in a unit found to be appropriate.

Opinions Below

The decision and order of the National Labor Relations Board is reported in 147 NLRB (No. 92). The decision of the Court of Appeals issued in No. 18805 is reported in ..... F. 2d ....., and is printed as the Appendix attached at pp. App. 1 to App. 5.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was made and entered on May 13, 1965, and a copy thereof is appended to this petition in the Appendix at pp. App. 6 to App. 7. The jurisdiction of this Court is invoked pursuant to 28 USC §1254 (1).

Questions Presented

The questions presented for determination by the Court have received conflicting disposition from several of the United States courts of appeal. The questions are important in the administration of the National Labor Relations Act in that the issues presented involve the basic right of employees to select or reject representatives for purposes of collective bargaining through the election procedures provided for by the Act. Numerous cases involving the same questions have already been decided by the Board, some of which undoubtedly will be presented to other courts of appeal. The questions are:

1. Whether an order by the National Labor Relations Board establishing a union as the exclusive bargaining agent effectuates the purposes of the National Labor Relations Act where:

(a) The union so sought to be established was rejected by the employees in a secret ballot election;

(b) The Board's finding of a union majority was based on authorization cards which state clearly on their face that the signer wants an NLRB election; and

(c) Union solicitors widely advertised during the sign-up campaign that the purpose of getting the cards was to secure a Labor Board election.

2. Whether an order of the National Labor Relations Board establishing a union as the exclusive bargaining agent effectuates the purposes of the National Labor Relations Act where:

(a) The union so sought to be established was rejected by the employees in a secret ballot election;

(b) The election was held by the Board pursuant to the union's petition for certification alleging a question affecting representation;

(c) The election was held pursuant to an agreement between the union and the employer, which agreement was approved by the Board;

(d) The union was aware prior to the election of the acts of the employer, found to be unfair labor practices by the Board; and

(e) The unfair labor practices found by the Board were non-aggravated and did not include discriminatory discharges, clear threats of retaliation, or a rejection of the collective bargaining principle.

Proceedings Below

These proceedings grew out of a petition for certification as bargaining representative of petitioner's employees filed with the National Labor Relations Board (herein referred to as the "Board"), by the International Union of Electrical, Radio & Machine Workers, AFL-CIO (herein referred to as the "Union"), on March 5, 1963.[1] The Company and the Union on March 15, entered into a stipulation for certification upon consent election, which was approved by the Regional Director on March 19, calling for an election on April 1 (J.A. 305).[2] In the election held by the Board on April 1, 75 of the 76 eligible voters cast ballots; 32 voted for the Union, 42 against, and 1 ballot was challenged (J.A. 310). The Union on April 5 filed objections to the election, requesting that the election be set aside, and that a new election be ordered (J.A. 298). On April 18 the Union filed charges with the Board alleging violations of §8 (a) (1), (2), and (5) of the Act (J.A. 298).

Following the issuance of a complaint and a hearing, the Trial Examiner issued a decision and recommended an order requiring the Company to cease and desist from: (1) interrogating its employees with respect to their union membership, (2) threatening employees with loss of employment, (3) granting increases or other benefits for the purpose of influencing its employees to accept or reject any labor organization, (4) urging or otherwise attempting to influence its employees to select any labor organization, and (5) from dominating, interfering with, or contributing assistance or support to a so-called "liaison committee" which had been established subsequent to the election. The Trial Examiner found that the Union had full knowledge

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[1] All dates are 1963 unless otherwise indicated.

[2] References are to the Joint Appendix filed with the Court below.

of the violations which he found to have occurred prior to the election and, applying the Board's decision in *Aiello Dairy Farms,* 110 NLRB 1365, dismissed the allegation in the complaint alleging a refusal to bargain, and recommended that a new election be held (J.A. 323-324). The Trial Examiner, however, in a footnote to his decision, found no merit in petitioner's contention with respect to the format of the card and the representations made to employees during the sign-up campaign and found that at the time the Union made its demand it had more than the necessary number of valid authorization cards from the 76 employees in the unit found appropriate (J. A. 320-321).

The Board in its decision and order issued on June 26, 1964 affirmed the Trial Examiner's rulings, except with respect to the dismissal of the refusal to bargain charge, and upon authority of its decision in *Bernel Foam Products Co.,* 146 NLRB (No. 161), ordered that petitioner, upon request, bargain with the Union as the exclusive representative of the employees in the unit found appropriate, and reversed the Trial Examiner's order for a new election (J.A. 296).

Subsequently, the Union filed a petition for review with the Court of Appeals for the District of Columbia Circuit, after which the Board also filed a petition for enforcement. The Circuit Court of Appeals in a *per curiam* opinion, simply affirmed the Board's order on the ground that the Board was within its authority in replacing the rule announced in *Aiello Dairy Farms, supra,* with the rule subsequently announced in *Bernel Foam Products Co., supra.* While the Court's main opinion made no comment with respect to the petitioner's contention with respect to the validity of the authorization cards, Judge Burger in a concurring opinion stated:

> "This authorization card seems to me misleading; a less than studied reading of it might well leave the impression that it authorizes the union only to petition for an election."

Judge Burger also approvingly commented upon the decision of the Court of Appeals for the Fifth Circuit in *NLRB* v. *Peterson Brothers, Inc.*, (CA-5, 1965) 342 F. 2d 221, that:

> "If such [authorization] cards are to substitute for a secret ballot, their terms ought to be unmistakable."

Statutes Involved

The pertinent portions of the National Labor Relations Act, 29 USC, §151-168, are set forth in the Appendix at pp. App. 8 to App. 9.

STATEMENT OF THE CASE

On February 20, 1963, Ellis Holland, the Union's field representative, met with a group of petitioner's female employees, at which meeting Holland explained the Board's rule requiring that 30 percent of the employees must sign union authorizations to support an election petition, and advised the group that it was union policy not to file a petition with the Board unless some 60 to 65 percent of the employees signed up. The group present at the meeting signed authorization cards and were given additional cards for submission to other employees (J.A. 300-301). Testimony conclusively indicates that the organizing group that met with Holland informed numerous employees at the time they were solicited to sign the cards that there would be an election for the Union, at which the employees would have a chance to vote on the Union. During the several days that the cards were circulated among the employees there was general talk that when a sufficient number of cards were signed there would be a Labor Board election (J.A. 320-321).

The card that was signed by these employees stated across the top: "Petition and Authorization to Show that I WANT AN N.L.R.B. ELECTION NOW." (See App. p. 4). By February 26, 51 of the Company's 76 production employees had signed such cards, most of the cards being dated February 21 and 22 (J.A. 300).

On February 26 Esslinger, petitioner's superintendent, because of the disruption in the plant caused by the card signing campaign, called the employees together and inquired as to what their gripes were (J.A. 209, 210, 301).

The employees mentioned higher wages, paid holidays, and hospitalization insurance. Esslinger suggested that the employees select a group to meet with management to iron out their differences (J.A. 301).

Esslinger reported the employee complaints to Vice President Daseke who in turn conveyed the information to President Vette, who was in Scottsdale, Arizona, at the direction of his doctor. After a series of telephone conversations between Daseke and Vette, Daseke was authorized to grant paid holidays, change the vacation plan, and to review wage inequities (J.A. 214, 244, 247, 249, 525).

The Union on March 1 sent the Company a telegram claiming it represented a majority of the employees and requested recognition. On March 5, after consulting with counsel, petitioner wrote the Union that it had no knowledge of the Union's majority status, that the employees should have a right to express their desires in a secret ballot, and that recognition would not be granted unless a majority of the employees voted for the Union in a Board conducted election. Also on March 5, the Union filed its representation petition with the Board (J.A. 302). On March 15 the Company and the Union entered into a stipulation for a consent election, which was approved by the Regional Director on March 19, calling for an election on April 1 (J.A. 298).

Prior thereto, on March 7, petitioner by letter advised the employees that they would receive six paid holidays, an additional week of vacation after 5 or more years of service, a hospital-surgical plan, the cost of which was to be divided between petitioner and the employees, and that an adjustment would be made in wage rates to correct "wage inequalities." In the paychecks received by the employees on March 15, 45 of the 76 employees received wage adjustments of at least 5¢ per hour (J.A. 303).

During the period March 18 to 28, Esslinger, as the plant superintendent, interviewed all of the plant employees. During these interviews Esslinger asked several employees for their opinion of the Union, pointed out that the Company could do as much for its employees as a union could, and indicated to several employees that the Company stood to lose some of its customers if there was a strike (J.A. 308-309).

Both the Company and the Union, in a hotly conducted pre-election campaign, directed written material to the employees who were to vote in the election. The Union emphasized the theme that only by voting for the Union could employees accomplish substantially improved wages and benefits (J.A. 288-292). The Company emphasized the theme that a union contract is worth nothing unless you have a job to go with it and that strikes and excessive costs are harmful to both the employees' and the Company's interests (J.A. 266-273).

The Company in its March 19 letter informed the employees:

> "If either a supervisor or Union agent tries to force you either into or out of the Union let us know and we will get it stopped." (J.A. 267).

In its March 28 letter the Company informed the employees:

> "The voting will be secret; no one will know how you vote. You have a real freedom of choice on the day of the election." (J.A. 271).

And in the March 29 letter, President Vette informed the employees that "I and the rest of the officers will accept your decision." (J.A. 273).

On Saturday, March 30, two days before the election, as part of the Union's campaign to solicit votes, several employees visited assistant foreman Hammond at her home. Hammond had previously signed a Union card and assumed she was eligible to vote, until informed to the contrary by the management. According to several Union witnesses, Hammond stated that Vice President Daseke knew who had signed Union cards. The employees informed Hammond that Daseke did not have the cards and that the Labor Board was the only one that ever got the cards (J.A. 307-308). Hammond testified that she doubted that the Company knew she had signed a card and that Daseke had never discussed the Union with her (J.A. 254). At the April 1 election, 32 employees voted for the Union and 42 against (J.A. 310).

On April 25, Vette announced the formation of a Liaison Committee to act as a line of communication and "act as a go-between for handling any shop problems such as inequities, gripes, etc. which may arise (J.A. 311). At the first meeting of the Liaison Committee on April 30, Vette announced his plan for an immediate temporary 5 percent wage increase, which would become permanent if production increased 5 percent in the following 4 months (J.A. 311). During this and subsequent meetings between the Company and the Liaison Committee, members of the committee suggested that work hours be changed during the summer months and the time for break periods be changed, and also that a ventilation problem be corrected, on which suggestions the Company acted (J.A. 311-312).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the District of Columbia Circuit should be reviewed, as it establishes two important principles with respect to the right of employees to freely choose their own bargaining representatives by a secret ballot election in the manner provided for in §9 (c) of the National Labor Relations Act. The decision here is in conflict with the decisions in other circuits. Neither principle has been decided by this Court and both should be.

1. THERE IS A DIRECT CONFLICT BETWEEN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA ON THE ONE HAND, AND THE COURTS OF APPEAL FOR THE FIFTH AND SEVENTH CIRCUITS ON THE OTHER WITH RESPECT TO THE AUTHORITY OF THE BOARD TO USE MISLEADING AUTHORIZATION CARDS, WHICH WERE REPRESENTED TO BE USED FOR THE PURPOSE OF SECURING A LABOR BOARD ELECTION, AS THE BASIS FOR ESTABLISHING A UNION AS THE BARGAINING AGENT FOR EMPLOYEES.

The Board in its decision affirmed the footnote finding of the Trial Examiner that on February 26, 1963:

> "* * * the great majority of the employees in the appropriate unit had designated the Union as the bargaining agent by the execution of valid authorization cards."

citing its own decision in *NLRB* v. *Peterson Bros., Inc.*, 144 NLRB (No. 65). (J.A. 295). While the validity of the authorization cards was contested before the Court

below, that Court affirmed the Board's finding and order without comment, except for the concurring opinion of Judge Burger.

The Court of Appeals for the Fifth Circuit denied the Board's petition for enforcement of the order issued by the Board in *Peterson Bros., Inc., supra*, insofar as that order required the employer to bargain with the union, 342 F.2d 221. The Fifth Circuit cited the decision of the Court of Appeals for the Seventh Circuit, *NLRB* v. *Koehler's Wholesale Restaurant Supply*, (CA-7, 1964) 328 F.2d 770, in support of its holding on the same principle, at 773.

The authorization cards rejected by the Fifth Circuit contained the following legend: "This card is for use in support of the demand of this union for recognition from the company in your behalf or for an NLRB election." *Peterson Bros., Inc., supra.* The Court held that because of this ambiguity on the card the Board was obligated to accept testimony relative to, and to consider the subjective intent of, the card signers. *Peterson Bros., Inc., supra.* In that case no election was held.

The Court of Appeals for the Seventh Circuit in *Koehler's, supra*, another case in which no election was held, also refused to enforce the Board's bargaining order. The Seventh Circuit held that testimony that card solicitors informed card signers that they would have a chance to vote in a secret election, and that the cards were needed in order to get the opportunity to vote, negated the validity of the authorization cards as designations of the union as bargaining agent. *NLRB* v. *Koehler's Wholesale Restaurant Supply, supra*, at 773. The Seventh Circuit reversed the finding of a majority of the Board that the

cards did *not* "lack reliability" and found that the employees who signed cards "were promised that such cards were to be used for the purpose of obtaining an election, with a secret ballot, to be conducted by the Board." *NLRB* v. *Koehler's Wholesale Restaurant Supply, supra,* at 773. The Court cited the Board's decision in *Englewood Lumber Co.,* 130 NLRB 394, where the Board had refused to accept authorization cards as proof of majority status because the employees were told that the cards were necessary in order that the Board might conduct an election by a secret ballot. *Koehler's Wholesale Restaurant Supply, supra,* at 772.

In the instant case we have both the card and oral representations that the purpose of signing the authorization cards was to get a Labor Board election. The face of the card speaks for itself. It states clearly that the card was signed "to Show that I WANT AN N.L.R.B. ELECTION NOW." Testimony shows that of the 51 cards introduced into evidence, 41 of them were tainted not only with the legend on the card itself but with misrepresentation or lack of knowledge that the signer by executing the card was designating the Union as his bargaining agent.

It is submitted that the Board and the Court of Appeals is in error in accepting authorization cards for the purpose of establishing a union's majority status, unless it is proven by a preponderance of the evidence that the employees clearly manifest an intention to designate the union as their bargaining representative. Where misrepresentation is shown, the employer need not prove that the employees were actually misled. *NLRB* v. *Trinity Steel Co.,* (CA-5, 1954) 214 F.2d 120, 123; *NLRB* v. *Trancoa Chemical Corp.,* (CA-1, 1962) 303 F.2d 456, 461.

2. THERE IS A CONFLICT OF DECISION BETWEEN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE COURT OF APPEALS FOR THE SECOND CIRCUIT RELATIVE TO THE BOARD'S AUTHORITY TO ISSUE A BARGAINING ORDER WHERE THE UNION WAS REJECTED BY A MAJORITY OF EMPLOYEES IN A SECRET BALLOT ELECTION CONDUCTED BY THE BOARD.

In the instant case, unlike the *Peterson* and *Koehler's* cases, *supra*, the employees, in an election petitioned for by the Union, agreed to by the employer, and conducted by the Board, rejected the Union as their bargaining agent.

The Court of Appeals for the District of Columbia in its *per curiam* opinion, simply held that the Board was within its statutory authority in requiring the employer to accept the Union as the employees' agent, notwithstanding the fact that the Union lost the election which it had requested. The Court of Appeals affirmed the Board's two to one decision which followed its previous decision in *Bernel Foam Products Co.*, 146 NLRB (No. 161), that because of the Company's acts following the Union's request for recognition, its request for a secret ballot election was not made in good faith but was for the purpose of undermining the majority status of the Union, and therefore a bargaining order was required to reestablish the status quo (J.A. 295-296).

Certain of the unfair labor practices found by the Board arose out of the Company's suggestion that the employees form a committee to discuss with management the complaints voiced at the February 26 meeting, and the granting of wage increases and other employee benefits in response to these complaints, all of which occurred prior to

March 15, the date on which the Union agreed to a secret ballot election. After the election was agreed upon, the Union issued leaflets promising to negotiate substantial wage increases and other employee benefits if the employees voted the Union in. The Company in letters to the employees, and in one or two cases during the course of the superintendent's interviews, emphasized that excessive Union demands could lead to a strike, which in turn could lead to a loss of customers and jobs. *After* the Union lost the election a further increase was granted, contingent upon an increase in production, and an employee committee was established to act as a line of communication between the management and the employees. While the Board in its decision characterized these acts as "extensive and flagrant" violations of the Act, there is no evidence of the Company engaging in threats of reprisal, discriminatory discharges, or a refusal to accept the Union if it were designated by a majority of the employees. Rather than any rejection of the collective bargaining process, President Vette in the last letter before the election informed the employees, "that however the situation turns out I and the rest of the officers will accept your decision."

The Court of Appeals for the Second Circuit in *NLRB* v. *Flomatic Corp.*, June 14, 1965, ... F.2d ....., while sustaining the Board's finding that the employer, immediately preceding the election, made promises of improved benefits and invited employees to deal directly with the employer, held that such actions do not warrant the Board depriving employees of the right to express their choice of bargaining representative in a secret election. The Court stated:

> "Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility

> that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees and thus frustrate rather than effectuate the policies of the Act."

The Court after commenting that authorization cards, by the Board's admission, are a "notoriously unreliable method of determining majority status of a union" and that "it is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer" announced the principle that:

> "Such card majorities must by necessity be deemed evidence of the *status quo ante* where the employer's conduct has been so *flagrantly* hostile to the organizing efforts of a union that a secret election has *undoubtedly* been corrupted as a result of the employer's *militant opposition.*" (Emphasis ours)

Thus, the essence of the principle laid down by the Second Circuit is that questionable card majorities are justified only where the employer's conduct has been so flagrantly hostile as to clearly establish that the employees were actually coerced into voting against the union.

In the instant case, while the Board's order sounds in terms of coercion, the facts on which the order is based manifest no clear resort to threats of reprisal, discriminatory discharges, or open rejection of the collective bargaining principle. That the violations were not flagrant is manifested by the Union's decision, after having knowledge of the acts which the Board found to be violations, not to file unfair labor practice charges until after it had lost the election.

Here the Board found that the misrepresentations as to the purpose of the openly signed authorization cards did not affect their validity, but found that the employer's acts impaired the employees' freedom of choice as manifested in the secret ballot election. These findings are no more sacrosanct than any other Board finding. *Trinity Steel Co., supra,* at 123. Since the Board statistics show that unions win only 52 percent of the elections when they present authorization cards from 50 to 70 percent of the employees (See statement of Chairman McCullough referred to in *NLRB* v. *Johnnie's Poultry Co.,* (CA-8, 1965) 344 F.2d 617, there is no basis for finding that a union which had cards from 51 out of the 76 employees would have won the election, but for petitioner's conduct.

3. THE QUESTIONS PRESENTED ARE IMPORTANT TO THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT AND SHOULD BE RESOLVED BY THIS COURT.

Section 7 of the Act establishes the broad policy of protecting the right of the employees "to bargain collectively through representatives of their own choosing" as well as the right "to refrain from any or all of such activities."

Section 9 (c) (1) of the Act provides the method through which employees shall select representatives of their own choosing and *specifically* directs the Board that when a petition for representation is filed, the Board, upon finding that a question affecting commerce exists, shall provide for a hearing and if, as a result of such hearing, it finds "a question of representation exists, *it shall direct an election by secret ballot and shall certify the results thereof.*" (Emphasis ours)

Hence, the clear mandate of the Act is that the Board, whenever a question of representation is found to exist, is limited to conducting a secret ballot election and certifying the results of that election.

In the instant case the parties waived a hearing by stipulation and agreed to the conduct of a secret ballot election to determine the admitted question affecting representation. The question presented is whether the Board may, consistent with the mandate of the Act to determine representation issues by secret ballot elections, disregard this mandate simply because in the period prior to the conduct of the election by the Board the employer indulges in nominal or borderline unfair labor practices.

As the Board itself observed in *Aiello Dairy Farms, supra*:

> "Thus, for the Board to proceed upon a representation petition requires the Board to find that a question of representation exists, to be resolved by an election. On the other hand, a charge of unlawful refusal to bargain under Section 8 (a) (5) of the Act must allege in effect that there is no question of representation and that the union involved is in fact the exclusive representative, with whom the employer is legally required to bargain. The bases of the two proceedings are thus mutually inconsistent." *Aiello Dairy Farms, supra.*

Thus, the Board by ordering recognition of a union as the employees' bargaining agent, after the union's defeat in an election, not only denies to employees secret ballot procedures provided for by the Act, but vituates its own processes by retroactively determining that no question of representation existed when it in fact had previously determined that such a question did exist and proceeded to an election for its determination.

It is clear that had the Board *not* found that the Company's preelection conduct was violative of the Act, it would *not* have issued its order establishing the Union as the employees' bargaining representative. That being the case, the question otherwise stated, is whether the Board in remedying 8 (a) (1) violations, has authority under the Act to disregard the employees' right to select representatives of their own choosing through the secret ballot process and issue an order requiring acceptance by both the employees and the employer of the Union as bargaining representative, based upon admittedly questionable authorization cards. The Court below declared that the Board had such authority and the Court of Appeals for the Second Circuit, in *NLRB* v. *Flomatic Corp., supra,* held that the Board did not have such authority.

Here, the Board clearly strikes a balance in favor of the Union and against the policy of the Act requiring secret ballot elections to determine representation issues. While the Board has authority to fashion appropriate remedies for unfair labor practices, such remedies must be adapted not only to the facts of the particular case presented but must be consistent with the mandate imposed on it by the Act. As this Court pointed out in a recent decision:

> "Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." *American Ship Building Co.* v. *NLRB,* March 29, 1965, 85 S. Ct. 955, ...

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,745

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

S.N.C. MANUFACTURING COMPANY, INC.,

Intervenor.

No. 18,805

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

S.N.C. MANUFACTURING COMPANY, INC.,

Respondent.

On Petition for Review and on Cross Petition for Enforcement of an Order of the National Labor Relations Board

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Decided May 13, 1965

Mr. Winn I. Newman, of the bar of the Supreme Court of Wisconsin, *pro hac vice,* by special leave of court, with whom *Messrs. Benjamin C. Sigal, David S. Davidson* and *Miss Marilyn G. Rose* were on the brief, for petitioner in No. 18,745.

Mr. Elliott Moore, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *George H. Cohen*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 18,745 and petitioner in No. 18,805.

Mr. O. S. Hoebreckx for intervenor in No. 18,745 and respondent in No. 18,805.

Before WASHINGTON, BURGER and MCGOWAN, Circuit Judges.

PER CURIAM: In No. 18,745, the Union complains of the action of the National Labor Relations Board in dismissing part of its complaint against S.N.C. Manufacturing Company (the Employer). In No. 18,805, the Board seeks enforcement of its order against the Employer, finding that it had violated Sections 8(a)(1), 8(a)(2) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)(2)(5). The Board's Decision and Order are reported at 147 N.L.R.B. No. 92 (1964).

The facts presented are very similar to those which were before us in *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 87 U.S. App. D.C. 360, 185 F. 2d 732 (1950), cert. denied, 341 U.S. 914 (1951), and our decision there is controlling here on most aspects of the case, as the Board recognized. We think there was sufficient evidence here to warrant the Board's conclusion under the principles stated in that case.

The Union complains that the Board erred in finding that the Employer did not violate Section 8(a)(1) when it reprimanded Employee Lewis, transferred Employee

Hebert, and allegedly attempted to have Employees Shafer and Hebert retract certain statements previously given to Board agents. The evidence was not entirely clear. But the Board's decision was supported by substantial evidence; therefore, we do not consider ourselves justified in overturning the conclusions favorable to the Employer reached by the Trial Examiner and later by the Board.

The Employer's challenges to the Board's findings and conclusions appear to us to be without merit. In particular, the Employer argues that the Union waived its right to file refusal-to-bargain charges by its action in proceeding to an election. This may have been a valid position under the rule announced in *Aiello Dairy Farms*, 110 N.L.R.B. 1365 (1954). But the Board has now rejected that rule, and, we think, it was within its statutory authority in so doing. See *Bernel Foam Products Co.*, 146 N.L.R.B. No. 161 (1964); *National Labor Relations Board* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (2d Cir. 1954), cert. denied, 348 U.S. 964 (1955); *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (9th Cir. 1952), aff'd, 346 U.S. 482 (1953); cf. *National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, 349 (1953); *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 117 U.S. App. D.C. 91 at 104 ff., 326 F. 2d 634 at 645 ff. (1963). And see Comment, 39 N.Y.U.L. Rev. 866 (1964).

The Board's decision and order are affirmed and their enforcement decreed.

So ordered.

Burger, *Circuit Judge, concurring:* I agree that the record contains sufficient evidence to support the Board's conclusions that the union had a majority of the employees at the time of its demand for recognition and that the

employer had no good faith reason to doubt that fact. The finding of a Section 8(a)(5) violation is accordingly sustainable.

However, a word is in order concerning the format of the authorization cards with which the union established its majority. Bold face type at the top of the form states "Petition and Authorization to Show That I WANT AN N.L.R.B. ELECTION NOW,"[1] the capitalized sentence being set off in a box by itself underneath the preceding words. Two paragraphs in ordinary type follow, the first paragraph authorizing the union to petition for an election and the second authorizing it to act as bargaining agent. After lines for name and address, a box at the bottom sets off the words "Sign Here" and space for a signature.

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[1] The following is a sample of an authorization card:

Petition and Authorization to Show That

I WANT AN N.L.R.B. ELECTION NOW

I, the undersigned, an employee of S.N.C. Manufacturing Company

hereby authorize the International Union of Electrical Radio and Machine Workers, IUE-AFL-CIO, to petition the National Labor Relations Board for an election as soon as possible.

I authorize the IUE-AFL-CIO to act as my bargaining agent with the company in regards to wages, hours and working conditions.

NAME (print) Grace Shafer Date 2/20/63
ADDRESS (print) R.R. 1 Van Dyne City .....
Dept. ..... Shift Day Phone MU 8-2453

Sign Here /s/ Grace Shafer

This authorization card seems to me misleading; a less than studied reading of it might well leave the impression that it authorizes the union only to petition for an election. Moreover, this possibility of confusion is unnecessary. As Chief Judge Tuttle of the Fifth Circuit said only recently,

> It would be very simple for the union to prepare a card that in an unambiguous form would authorize union representation as a bargaining agent. If the union also wished to have cards signed to call an election this would also be a very simple matter. There can be little excuse for combining the two in a card that makes possible . . . misrepresentation . . . .

NLRB v. *Peterson Brothers, Inc.*, 5th Cir., No. 21412, March 11, 1965, p. 7. Our observation in *Joy Silk Mills* v. *NLRB*, 87 U.S. App. D.C. 360, 371, 185 F. 2d 532, 543, *cert. denied*, 341 U.S. 914 (1950), that "an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent" should not be taken to license the use of misleading authorization cards. If such cards are to substitute for a secret ballot, their terms ought to be unmistakable.

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964
(Filed May 13, 1965)

No. 18,745

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

S.N.C. MANUFACTURING COMPANY, INC.,

Intervenor.

No. 18,805

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

S.N.C. MANUFACTURING COMPANY, INC.,

Respondent.

On Petition for Review and on Cross Petition for Enforcement of an Order of the National Labor Relations Board

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BEFORE:

WASHINGTON, BURGER and MCGOWAN, *Circuit Judges*

DECREE

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and decreed by this court that the decision and order of the National Labor Relations Board on review in these cases are affirmed and will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Curiam.

Dated: May 13, 1965

APPENDIX III

STATUTES

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 7 —

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 9 (c) (1) —

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 446

SNC MANUFACTURING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not yet reported. The Board's Decision and Order (R. 293-298)[1] are reported at 147 NLRB 809.

JURISDICTION

The decree of the court of appeals was entered on May 13, 1965 (Pet. App. 6-7). The petition for a

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[1] "R" refers to the portions of the record printed as a joint appendix in the court below.

writ of certiorari was filed on August 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that a majority of the employees provided the union with valid authorizations to represent them for collective bargaining purposes.

2. Whether the Board properly directed the employer to bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at App. 8-9 of the petition. Section 8(a)(5) of the Act, also relevant herein, provides:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. Late in 1962, the Union [2] began an organizing campaign at petitioner's plants (R. 299; 17-19). At

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[2] International Union of Electrical, Radio and Machine Workers, AFL-CIO.

a meeting with some of petitioner's employees on February 20, 1963, Ellis Holland, Union field representative, explained that, once a majority of the employees demonstrated that they wanted the Union by signing authorization cards, the Company could voluntarily recognize it as the bargaining agent or the Union could petition for an election. With respect to the latter possibility, Holland explained the Board's rule requiring a 30 percent showing of interest [3] as a condition precedent to processing an election petition, but added that it was Union policy not to file a petition unless the Union had a 60 to 65 percent showing of support. The employees present at the meeting were given authorization cards to sign and additional cards for their fellow employees (R. 300-301; 101-102, 109-110, 119, 189-191). During the next several days, cards were circulated in the plants, and, by February 25, 51 of the Company's 76 production and maintenance employees had signed them (R. 300-301; 284-286).[4]

The authorization cards were headed: "Petition and Authorization to Show That I WANT AN N.L.R.B. ELECTION NOW," and contained the following two paragraphs:

> I, the undersigned, an employee of _____ hereby authorize the International Union of Elec-

[3] National Labor Relations Board Rules and Regulations and Statements of Procedure, Sec. 101.17-101.18, 29 C.F.R. 101.17-101.18; see also *National Labor Relations Board* v. *J.I. Case Co.*, 201 F.2d 597, 598-600 (C.A. 9).

[4] It was stipulated that petitioner had 76 production and maintenance employees as of March 2 (R. 302; 139-140, 284).

> trical, Radio and Machine Workers, I.U.E.-AFL-CIO to petition the National Labor Relations Board for an election as soon as possible.
>
> I authorize the I.U.E.-AFL-CIO to act as my bargaining agent with the Company in regard to wages, hours and working conditions.

There followed spaces for the employee's name, address, signature and other relevant information (R. 285).

In accordance with the language on the cards, Union Representative Holland advised the employees to whom he spoke on February 20 that the cards would be used for the dual purposes of requesting recognition and an election. Four of the employees who attended this meeting signed cards and were the principal Union solicitors (R. 54, 92, 109-110, 119). Three employees testified that the solicitors informed them that the purpose of signing the card was to join the Union or to have the Union as their representative (R. 320-321; 145-146, 81, 149). And two employees, who understood that the cards authorized the Union to represent them, testified that the solicitors did not tell them that there would have to be an election (R. 79, 82). Ten employees who obtained cards from Union solicitors did not reveal what, if anything, they were told when they were given cards (R. 74, 135-136, 142-143, 146-148, 176, 180-181, 202-203, 208-209, 168, 177-178). Five employees stated that they were told there would be an election, but no employee claimed that he was told that the sole purpose of the cards was to obtain an election (R. 77, 151, 158, 184-185). Fourteen other employees obtained their

cards from an unattended box left in the ladies' restroom (R. 88, 91, 125-126, 127-128, 133, 152, 156, 173, 198-199, 205, 244-246, 129, 162-163, 171).[5] No testimony was offered as to thirteen of the cards (R. 320).

Plant Superintendent Esslinger addressed petitioner's employees on the morning of February 26 and told them that he knew about the Union meetings and who was working for the Union. He suggested that, to maintain the "one big family" relationship between the Company and its employees, it would be better if the employees could bargain directly with management, perhaps through a shop committee. After discussing with the employees the benefits they wanted, he asked them "to, among themselves, elect or appoint * * * a representative group to meet with management and iron out their differences." Shortly after Esslinger's talks, a joint meeting was held at which the employees discussed the pros and cons of a shop committee as opposed to the Union (R. 301-302; 18-23, 45-46, 56-58, 93-94, 102, 111-113, 120-122, 199-200, 209-212). This issue was put to a vote, and, while no formal count was taken, a substantial majority indicated a preference for the Union (R. 302; 58, 94, 113).

2. On March 1, the Union informed the Company that it had been designated by a majority of the production and maintenance employees as

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[5] Employee solicitor Lewis put the box there, sealed it, opened the top so that the cards could be inserted, and placed blank cards behind the box. She employed this system as "there wasn't much time" to solicit (R. 110).

their representative and requested recognition and bargaining (R. 302; 283, 24). On March 5, Plant Superintendent Esslinger and Vice-President Daseke replied that the Company had no knowledge of the Union's majority status, that the employees should be allowed to express their desires by secret ballot, and that therefore recognition would not be granted unless a majority of the employees voted for the Union in a Board-conducted election (R. 302; 283, 214). Also on March 5, the Union filed with the Board a petition for an election, which Esslinger learned of on March 6 or 7 (R. 302; 25-26, 257, 283.) On March 15, the Company and the Union entered into a "Stipulation for Certification Upon Consent Election," calling for an election on April 1 (R. 305; 44, 257, 259).

Thereafter, the Company engaged in an active campaign to dissuade the employees from voting for the Union. By letter dated March 7, the Company advised its employees that they were to be granted certain new benefits (R. 265).[6] From March 18 to 28, Esslinger systematically interviewed all the Company's employees individually, during working time, either in his own office or the offices of other management officials (R. 308, 217-218). He interrogated numerous employees as to their views about the Union and why they preferred it to a shop committee, and he criticized the failure to approve such a committee, pointing out that the Company could do as much for its employees as a union could (R. 308;

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[6] The new benefits correspond to the benefits requested by employees at the February 26 meetings (R. 303, 313).

59-60, 78, 82, 87-88, 116-117, 136, 137-138, 152-153, 200-201). Esslinger asked one employee whether she would still want the Union if she were to receive a 5 percent wage increase and better working conditions (R. 309-310; 202-203). To another, he stated that Allen-Bradley was one of the Company's largest customers, that the Company needed this account to stay in business, but that he did not think that Allen-Bradley would continue to buy S.N.C. products if the Union got in (R. 308-309; 86). Esslinger told another employee that, if the Union came in and a strike occurred, customers would not buy the Company's products "and then we [the employees] would lose out of a job" (R. 309; 150-151). Another employee was told that, if the Union got in, Allen-Bradley "perhaps wouldn't buy our coils" (R. 183-184).

Esslinger's statements that work would be lost if the Company were unionized (R. 44-45, 220-221) were reinforced by six letters sent by the Company to its employees during the period March 14-29. The first five letters were signed by Esslinger and emphasized, *inter alia*, that the employees might be without jobs if they selected union representation (R. 266-272). The final letter, dated March 29, three days prior to the election, contained a personal plea from Company President Vette for a vote against union representation (R. 273). Attached thereto were letters from Simberkoff Sales Company and Scott Electronic Sales, paid sales representatives of S.N.C., which Vette "thought might be of interest to the employees." Simberkoff's letter, after expressing concern

over the possible unionization of the Company's plants and pointing out that the "consistent volume of business" from the larger customers is based on the Company's "present labor setup," stated (R. 274):

> These large customers have come to depend upon us as they do because they know we will not put them in a bind for transformers due to labor difficulties. Even though they may have unions in their own plants, they questioned us when they first started doing business with us whether we had a union or not, and I know it was the fact that we have had no labor difficulties which prompted them to give us the good long run items that have continued for some years, and are still running.

The Scott letter, in pertinent part, asserted (R. 275):

> * * * In the past we have been able to secure many orders due to the fact that you have a non-union shop. Many of our customers have placed orders with us rather than our competitors due to this one factor.
>
> We were very concerned when we learned there was a possibility of a union going in at SNC. We feel we may be handicapped in future sales if the Union is established.

3. On April 1, the Regional Director conducted an election among the Company's employees at which 75 of the 76 eligible voters cast ballots—32 voted for the Union, 42 against, and 1 ballot was challenged. On April 5, the Union filed objections to the election, alleging that the Company had interfered with employee free choice by threatening employees with loss

of jobs and other economic reprisals, interrogating them concerning their union activities, granting wage increases and other benefits to influence votes, and attempting to assist the formation of an independent union (R. 298; 256, 257-258). Thereafter, the Union filed unfair labor practice charges, alleging that, by the foregoing action and its refusal to bargain with the Union, the Company had violated Sections 8(a)(1) and (5) of the Act (R. 298).[7]

The complaint based on the unfair labor practice charges was issued on July 17 and consolidated for hearing with the objections to the election (R. 298).

B. THE BOARD'S DECISION AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by promising and granting benefits to employees in order to dissuade them from union representation; urging employees to form a shop committee and deal with the Company through it rather than through the Union; granting wage increases and promising further benefits after consultation with the Liaison Committee; interrogating employees concerning their union activities and giving them the impression that those activities were under surveillance; and threatening employees with eco-

[7] The Union later amended its charge to allege a violation of Section 8(a)(2), based on the Company's unilateral establishment in mid-April of a Liaison Committee, composed of 6 employees selected by management, whose function was to handle any problems concerning working conditions which might arise (R. 311; 36-37, 53, 99, 104, 223, 225, 237-238, 431-432, 454-455, 241, 277).

nomic reprisal if they selected union representation (R. 294, 312-317).[8]

The Board further concluded that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (R. 294-296). The Board found, contrary to the Company's contention, that the Union, when it requested recognition, had valid designation cards signed by a majority of the employees in the appropriate unit. The Board also rejected the Company's contention that its refusal to recognize or bargain with the Union was based on a good faith doubt of the Union's majority status. For, "in view of the extensive and flagrant violations of Section 8(a)(1) engaged in by [the Company] which followed the Union's demand, [the Company's] refusal on March 5 to recognize and bargain with the Union without a Board certification was not based on a good-faith doubt of the Union's majority but was for the purpose of undermining that majority status" (R. 295).[9]

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[8] The Board also found that the Company violated Section 8(a)(2) of the Act by dominating, assisting, and supporting the Liaison Committee (R. 294-295, 317-318).

[9] In reaching these conclusions, the Board adopted its Trial Examiner's factual findings (R. 320-321, n. 32). The Trial Examiner, relying on *Aiello Dairy Farms*, 110 NLRB 1365, held that the Union had "waived" the violation of Section 8(a)(5) by proceeding to an election with knowledge of the facts concerning the Company's refusal to bargain (R. 318-319). The Board, in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, reversed the waiver rule of *Aiello* and therefore did not apply it here (see *infra*, pp. 13-14).

The Board's order requires, *inter alia*, that the Company cease and desist from the unfair labor practices found and bargain with the Union on request (R. 296-297, 323-325).[10]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals found that the Board's findings were supported by the evidence and enforced the Board's order in full (Pet. App. 2-3). Judge Burger, concurring, agreed "that the record contains sufficient evidence to support the Board's conclusions that the Union had a majority of the employees at the time of its demand for recognition and that the employer had no good faith reason to doubt that fact" (Pet. App. 3-4).

ARGUMENT

The decision of the court of appeals is correct and there is no conflict of decisions. There is no occasion for further review.

1. The Company contends (Pet. 11-13) that the Union improperly used its authorization cards to prove its majority status because, petitioner argues, the signers did not intend to authorize representation, but meant only to request that an election be held. This question turns on the facts peculiar to the case and, therefore, raises only an evidentiary issue which is not appropriate for review by this Court. See

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[10] The Board also sustained the objections to the election and dismissed that proceeding (R. 296).

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, petitioner's contention is without merit. The language on the cards indicated that they were to serve two purposes—to authorize the Union to act as bargaining agent and also to furnish support for a Board election (*supra*, pp. 3-4). There is no indication that Union solicitors told the employees that the cards would be used solely for the purpose of obtaining a Board election (*supra*, p. 4). In these circumstances, it has consistently been held that the cards constitute a valid designation of the union's representative status, and they may not be impeached by testimony of employees, given long after the cards were obtained,[11] that they had a different intention.[12] Furthermore, the vote taken at the employees' meeting on February 26 (*supra*, p. 5) shows that the Union properly claimed the support of the majority of petitioner's employees.

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[11] Thus, some of the employees testified that, from a general discussion in the plant, they thought there would be an election (See, *e.g.*, R. 90, 92, 126, 128, 135).

[12] *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750 (C.A. 6), petition for certiorari pending, No. 295, this Term; *National Labor Relations Board* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), certiorari denied, 348 U.S. 964; *National Labor Relations Board* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9), certiorari denied, 348 U.S. 821; *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9), certiorari denied, 312 U.S. 678.

National Labor Relations Board v. *Peterson Bros.*, 342 F. 2d 221 (C.A. 5), is distinguishable on its facts. The Fifth Circuit concluded that the card in *Peterson*, worded somewhat differently from the one here, was ambiguous on its face (342 F. 2d at 224). Furthermore, the court, upon analysis of the evidence, found that at least four employees—all necessary to give the union a majority—had misunderstood the card (*id.* at 225). There was no such evidence here. Also distinguishable is *National Labor Relations Board* v. *Koehler*, 328 F. 2d 770 (C.A. 7). There, unlike here, the court found that the union organizers had led the employees to believe, at the time they signed the cards, that the cards would only be used to obtain an election (328 F. 2d at 773).

2. Petitioner also contends (Pet. 17-19) that the Board exceeded its authority in ordering the Company to bargain with the Union on the basis of its card majority, because, by proceeding to an election in the face of the Company's refusal to bargain, the Union must be deemed to have waived its right to file unfair labor practice charges respecting that conduct. The Board had enunciated this waiver rule in *Aiello Dairy Farms*, 110 NLRB 1365, but subsequently found that it did not serve the policies of the Act. As the Board explained in *Bernel Foam Products Co.*, 146 NLRB 1277, 1280, which was followed here:

> * * * [T]here is no warrant for imposing upon the union * * * an irrevocable option as to the method it will pursue in seeking vindication of the employees' representation rights while permitting the offending party to enjoy at the ex-

> pense of public policy the fruits of such unlawful conduct. The fact that in an election a vote favorable to the union may obviate for it the necessity for pursuing the unfair labor practice route does not, in our view, warrant requiring that the union forfeit the right to request that the effect upon it of the employer's unlawful conduct be rectified when it develops that such conduct has been sufficiently onerous to interfere with the election and to cause a substantial deterioration in the union's [majority] status.

The rule set forth in *Aiello* was not a statutory command, but a matter of Board discretion. The Board was free to change the rule if it found it unsatisfactory in light of the policies of the Act. As shown above, the Board had rational grounds for so concluding. Accordingly, the *Bernel Foam* doctrine has been approved not only by the court below but by the other circuits which have considered it. *The Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128 (C.A. 8), petition for certiorari pending, No. 468, this Term; *Irving Air Chute Co., Inc.* v. *National Labor Relations Board*, No. 29425 (C.A. 2), decided August 18, 1965, 59 LRRM 3052; see *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2).[13]

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[13] The *Aiello* rule was actually a departure from prior Board precedent, see, *e.g.*, *The M.H. Davidson Co.*, 94 NLRB 142; *Model Mill Co., Inc.*, 103 NLRB 1527. The earlier rule, which *Bernel Foam* in effect returns to, had been approved by the courts on many occasions. See *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C.A. 9); *National Labor Relations Board* v. *Model Mill Co.*, 210 F. 2d 829 (C.A. 6); *National Labor Relations Board* v. *Southeastern*

The *Flomatic* case, *supra*, is not to the contrary. The Second Circuit indicated its approval of the *Bernel Foam* doctrine (347 F. 2d at 79), but declined to enforce the bargaining order in *Flomatic* because of the special circumstances of that case. The court pointed out that, since no previous demand for recognition had been made by the union on the basis of its card majority, there was no violation of Section 8(a)(5) (*id.* at 76). And, although it recognized that a bargaining order could be an appropriate remedy for an 8(a)(1) violation, the court was of the view that, since the 8(a)(1) violation there was not "flagrant," a bargaining order was not justified in that case (*id.* at 78-80). Here, on the other hand, there was a refusal to bargain in violation of Section 8(a)(5), and the court of appeals sustained the Board's finding that the Company's violations of Section 8(a)(1) were "extensive and flagrant" (R. 295).[14] Indeed, the Second Circuit, in upholding the Board's bargaining order in *Irving Air Chute, supra*, distinguished its decision in *Flomatic* on just these grounds.

Rubber Mfg. Co., Inc., 213 F. 2d 11 (C.A. 5); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C.A. 2), certiorari denied, 348 U.S. 964.

[14] *Flomatic* involved one violation of Section 8(a)(1); a letter distributed by Flomatic's president the day of the election was found to contain promises of benefits contingent on defeat of the union. 347 F. 2d at 76-77. In contrast, the Section 8(a)(1) violations in this case involved, *inter alia*, threats of economic reprisals, coercive interrogation, and granting of substantial new benefits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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